MACDL Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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PRESIDENT'S LETTER

Missouri Legislature Outlaws Sex!

Senate Bill 693, passed by the legislature in May and signed into law by Governor Carnahan this summer, appears to outlaw any purposeful sexual contact. The statute states in part, "A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex, or he purposely subjects another person to sexual contact or engages in conduct which would constitute sexual contact except that the touching occurs through the clothing without that person's consent."

The legislature may have intended the phrase "without consent" to apply to the prohibition on purposeful sexual contact but, if that is the case, the bill as written permits "deviate sexual intercourse" between persons of the same sex if both have consented.

The ambiguity of the statute was pointed out to a reporter from The Riverfront Times, a weekly St. Louis newspaper, who contacted me shortly before the August 26 meeting of the MACDL Board of Directors. Recognizing the importance of the matter, I exercised executive privilege and immediately added it to the agenda for that meeting.

The bill's sponsor, quoted in the RFT, says prosecutors suggested the wording of the bill. Richard Callahan, Cole County prosecutor and past president of the State Prosecutor's Association, told the RFT he did not believe the courts would support such an obviously unconstitutional interpretation of the statute; presumably, he was referring to the prohibition of sexual contact. Callahan offered no comment on the constitutionality of the criminalization of "deviate sexual intercourse."

NACDL Meets in Michigan

The National Association of Criminal Defense Lawyers held its annual meeting and seminar in Traverse City, Michigan on August 11-13. Several MACDL members attended and benefitted from an outstanding seminar on search and seizure issues. The two Missourians on NACDL's Board of Directors, Burt Shostak of St. Louis and Charlie Atwell of K.C., participated in the quarterly board meeting which followed the seminar. Topics debated at that meeting included raising NACDL dues for private practitioner and public defender members, and renewal of

(continued on page 3)

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TABLE OF CONTENTS

President's Letter
Dan Viets 1

Missouri Non-Partisan Court Plan Under Attack 5

Significant Federal Cases
Elizabeth Unger Carlyle 6

Recent Missouri Cases
Kris Daniel 12

MACDL Members May Attend P.D. Trial Skills Workshop 14

The Chamber - Book Review
James D. Worthington . . . 15

1994 Federal Crime Bill Report . . 15

New Members/ Membership Renewals 17

F.Y.I.
Francie Hall 18

Membership Application Form . . 19

The ***Action Report*** is published quarterly by the **Missouri Association of Criminal Defense Lawyers.** We welcome articles submitted by **MACDL** members. Please submit articles, letters to the editor, sample motions, etc. on 3.5" or 5.25" high density or double density disk, along with a hard copy; if not WordPerfect 5.1, please advise what program you've used. Mail to: Francie Hall, Executive

PRESIDENT'S LETTER *(cont'd from p. 1)*

NACDL's contract with Keith Stroup, Executive Director for the past several years. The dues increase was approved; Keith's contract was not.

Federal Crime Law

The federal crime law passed by Congress in late August is terrible in many respects. On the other hand, NACDL's legislative committee and Cheryl Epps, Legislative Director, agreed that, had this bill not passed, there would be tremendous pressure for a more draconian bill in the near future. This bill did become worse during the voting process. In the House, the initial rejection on a procedural vote resulted in a "toughening" of the bill in that the retroactive aspect of the "safety valve" provision was eliminated. However, the safety valve did survive in part. The law provides an alternative for federal judges to sentence first-time, nonviolent drug offenders to as little as six months in many cases, even though it will not provide any relief for those who are already serving mandatory minimum sentences.

The law provides for the establishment of a national Crime Commission, and mandates a subcommittee of this group devoted specifically to studying drug policy. We can hope these groups recommend some rational reforms.

Details of the three-strikes provision are becoming clearer. Offenders who have committed at least two violent offenses, the latter of which is a federal crime, may be sentenced to life imprisonment. Either the first or second felony conviction may be either state or federal, violent or nonviolent, but the third "strike" must be a violent federal offense.

The law creates many new death penalty offenses, including participation in a continuing criminal enterprise (CCE) involving at least 60,000 marijuana plants or kilograms of marijuana. The death penalty may be inflicted on marijuana dealers even though no death of or physical harm to a person is proven.

NCDC

At our August 26 meeting in Columbia, the MACDL Board voted to fund a scholarship for a Missouri attorney to the National Criminal Defense College in Macon, GA. This year's NCDC, December 9-11, features Theories and Themes Through Opening, Cross and Closing: An Advanced Course in Persuasion. Interested in attending, or applying for a scholarship? Contact: NCDC, Mercer Law School, Macon, GA 31207 (912/746-4151).

NORML Key West Seminar

Since 1984, many of the country's finest criminal defense attorneys have gathered on the first weekend in December in Key West, FL, for the best seminar on defending marijuana charges. The event is sponsored by NORML. This year's speakers include Keith Stroup, current NACDL Executive Director and founder of NORML; Gerry Goldstein, newly installed NACDL President; Robert Fogelnest, NACDL President-Elect; and many other outstanding leaders of the American criminal defense bar. Having attended six of the last ten NORML seminars, I can attest that Key West in December is near paradise: The weather is perfect, hotel rates are reasonable and the island is not crowded. For details, call me (314/443-6866) or NORML (202/483-5500)

PRESIDENT'S LETTER *(cont'd from p. 3)*

Governor Appoints DWI Commission; No Defense Attorneys Invited.

Gov. Carnahan announced the appointment of a Governor's Commission on Driving While Intoxicated and Impaired Driving. Committee appointees include prosecutors, judges, state troopers and the executive director of Mothers Against Drunk Driving, but not a single defense attorney. As President of MACDL, I wrote the governor on July 14 to express our disappointment. I pointed out that, although every public official and law enforcement officer is sworn to uphold our constitution, defendants and their counsel are often the only ones in the courtroom who seem to honor that oath. I did point out that we are not opposed to reasonable, effective and **constitutional** efforts to reduce drunk driving. As of September 1, Governor Carnahan had not responded.

MoBar Committee on Criminal Disclosure

Hugh Kranitz, past president of **MACDL** and Chair of the MoBar Criminal Law Committee, has formed a subcommittee to review the Missouri Criminal Rules on Discovery. Peter Sterling of the Missouri Public Defender's Office in Columbia will chair; I have been invited to serve on the subcommittee. Any suggestions from criminal defense attorneys on how the rules might be improved are welcome, and may be submitted to me or Peter Sterling.

MACDL Directory

The first published directory of MACDL members will be going to press shortly. If your phone or address has changed since your last membership renewal, be sure to provide updated information **immediately** to Francie Hall, MACDL's Executive Secretary, at 416 E. 59th Street, K.C., MO 64110 (816/855-6650). If you know attorneys who should be MACDL members, let them know that by joining immediately they may still be included in our directory.

MACDL Fall Seminars

The schedule of MACDL's annual series of fall criminal defense seminars is:

OCTOBER 14 - ST. LOUIS;
OCTOBER 21 - SPRINGFIELD;
OCTOBER 28 - KANSAS CITY;
NOVEMBER 4 - COLUMBIA.

Mark your calendar now and plan to attend the program in your area. The seminars will cover Missouri case law updates; 1994 federal crime law; use of demonstrative evidence; Missouri and federal prisons, programs and boot camps; ethics, conflicts of interest and fee setting; federal and state appellate advocacy; and effective utilization of computers in law office administration and legal research.

Sincerely,

Dan Viets, President

MACDL's Annual Spring Seminar, *Defending Criminal Cases*, will be held April 28-29, 1995 at the Marriott Pavilion Hotel in Downtown St. Louis.

MISSOURI NON-PARTISAN COURT PLAN UNDER ATTACK

As you should know, the Missouri Constitution was amended in 1940 to provide for the appointment of state court judges by a method other than partisan elections. The plan remains in effect in Jackson, Clay, Platte and St. Louis Counties, and St. Louis City. Other jurisdictions may opt into the plan by a majority of voters in any general election where the plan appears on the ballot. At its passage, the amendment was hailed as a boon to the quality of justice, and as sounding the death knell for the possible purchase of judicial power (prevalent during the Pendergast era in Kansas City and elsewhere in the state).

The non-partisan plan provides for the nomination of candidates by a five-member commission comprised of two private citizens appointed by the governor; two attorneys selected by vote of the licensed attorneys in the circuit; and the chief judge of the appellate court which presides over the circuit. Candidates submit a written application and five letters of recommendation to the commission. All nominees are interviewed, and a panel of three is forwarded to the governor for final appointment of one candidate to the bench. Since its inception in 1940, more than thirty states have embraced some form of Missouri's plan as the preferable method of judicial selection. In Texas, where partisan judicial elections are still the norm, a supreme court judge recently reported that any viable candidate in his state would need to raise a minimum of $1 million in campaign contributions.

Non-partisan judges do not regularly hit up members of their local bar for deep-pocket contributions because they do not regularly seek re-election against a challenger. They do, however, run on their own reputations and the strength of their performances on the bench in regular retention elections. At a time when the general public sentiment toward most 'politicians' is to "throw the bastards out", non-partisan judges seeking retention appear on ballots during partisan elections of local, state and federal candidates.

It is incumbent upon members of the bar who embrace the sanctity of the Missouri non-partisan plan to vote, to inform the general public of the advantages of perpetuating the non-partisan plan, and to highlight for the public the particular strengths of those judges up for retention.

Judges who are personally attacked in the media for particularly difficult decisions are very much at risk during election years. Jackson County Circuit Judge Jon R. Gray was publicly criticized recently for granting a 120-day call-back to a defendant and placing him on probation. According to the defense, the prosecution's case was weak and evidence of self-defense was strong. The defendant was employable and could be ordered, among other things, to make restitution to the victim's family. A local talk-show host reacted by labelling Judge Gray "soft on crime."

Because judges are forbidden by the canons from discussing particular pending cases, and because non-partisan judges are not permitted to actively campaign for retention, unfair political and personal attacks often go unchallenged. Make it your business to know the quality of your bench. Share the information with family, co-workers and the general public. Last but not least, of course, **VOTE** on November 8, 1994.

SIGNIFICANT FEDERAL CASES - EIGHTH CIRCUIT

by Elizabeth Unger Carlyle ©1994

NOTE: This column includes cases decided April-July, 1994.

APPELLATE PROCEDURE

Branch v. Turner, No. 92-3935, 6/28/94

The dismissal of the defendant's state appeal was improper, and habeas relief was granted. The court used the fugitive dismissal principle, but the defendant was a fugitive for only three days between trial and sentencing, and filed her notice of appeal within the time which would have been allowed had she been sentenced on her original date. The court of appeals dismissed after full briefing and oral argument on the merits. When the state grants a right of appeal, the procedures must comply with the Due Process Clause, which forbids arbitrary state action. "If a defendant's pre-appeal flight does not adversely affect the appellate process... there is no rational justification for a state appellate court to strip the defendant of the right to appeal under the fugitive dismissal rule."

CAPITAL PUNISHMENT

Hill v. Lockhart, 93-2894 7/5/94
Habeas relief was granted, and the death penalty was vacated, because the defendant received ineffective assistance of counsel in the penalty phase. The defendant had an extensive mental illness history which was neither investigated nor presented. In ineffective assistance of counsel issues on habeas corpus, the Strickland standard for determining harm is the functional equivalent of the Brecht standard, and no separate Brecht analysis is required. Here, the evidence might have changed the jury's finding that there were no mitigating circumstances, so harm was shown.

Starr v. Lockhart, No. 92-1466, 5/2/94
The death sentence was reversed for ineffective assistance of counsel at sentencing. The failure to object to the "heinous atrocious or cruel" aggravating circumstance was ineffective assistance given that Godfrey v. Ga. was decided 6 years before the defendant's trial. In states which require the weighing of aggravating and mitigating circumstances, the consideration of an invalid aggravating factor is fatal to death verdict. There was also error under Ake v. Oklahoma in failing to appoint an expert for the defendant's diminished capacity defense. More is required under Ake than a mental examination by a state expert and the power to subpoena the expert; the defendant is entitled to an appropriate exam and assistance in evaluating and preparing the defense. This issue was preserved at trial and the Arkansas rule requiring plenary review of death penalty cases overcomes any failure to raise the issue on appeal, so there is no default.

CIVIL RIGHTS LITIGATION

Davidson v. Harris, No. 93-3055, 7/21/94
The judgment in this §1983 case in favor of the defendants was reversed where the defendants excluded blacks from the jury by using peremptory strikes. The explanations for the strikes were not accepted because similarly situated white jurors were not struck.

Cokeley v. Endell, No. 93-2821, 6/16/94

Dismissal under 28 U.S.C. §1915(d) was improper where the claim that plaintiff was improperly treated as a convicted person by the prison after habeas relief had been granted was a "novel claim with an arguable legal basis."

Jones v. McHan, No. 93-3859, 7/11/94
Although the plaintiff received only nominal damages, a $10,000 attorney fee (reduced from $25,000 originally awarded) was proper. Under Farrar v. Hobby, the three-part test for the availability of attorney fees in nominal damages cases is: the difference between the amount sought and the amount recovered; the significance of the legal issue on which the plaintiff prevailed; and the public goal or purpose served by the litigation. Here, the discrepancy between pleading and recovery was far less than in Farrar, the vindication of the right to be free of cruel and unusual punishment is a significant legal issue, and in bringing this suit, the plaintiff served as a private attorney general. Further, unlike the plaintiff in Farrar, the plaintiff here suffered a direct personal injury. The attorney handled the case efficiently and the fee will not be a windfall to counsel.

Munz v. Michael, No. 93-1865, 7/1/94
The denial of summary judgment and qualified immunity to deputy U.S. Marshals who allegedly beat a bound prisoner in a jail cell was proper. The allegations of the complaint were neither irrational nor wholly incredible, and the right to be free of such beatings is clearly established.

Kemp v. Balboa, No. 92-2038, 5/5/94
A new trial on damages was required where the trial court erred in permitting a nurse, who was a witness for the defendants in a §1983 case, to testify from medical records that the plaintiff did not pick up his medication. The records were not introduced into evidence, and the nurse's testimony was hearsay.

Hummel-Jones v. Strope, No. 93-1471, 5/26/94
Where officers searched a birthing clinic while an infant and parents were in residence, using a conclusory search warrant, summary judgment in their favor was improper. The manner of executing the warrant was clearly unreasonable. Qualified immunity was also unavailable.

Kinney v. Kalfus, No. 93-3221, 5/25/94
Summary judgment was properly denied in a suit against a prison dentist alleging that the dentist pulled the wrong tooth and refused to treat the plaintiff's dental problems. A factual issue exists as to deliberate indifference.

COMPULSORY PROCESS

Swink, No. 93-1763, 4/15/94
It was error to exclude the testimony of a defense witness that the defendant did not have knowledge and criminal intent. The witness was the father and co-defendant of the defendant; his trial had been severed.

EFFECTIVE ASSISTANCE OF COUNSEL

Shaw, No. 93-2052, 5/16/94
A claim in a habeas petition that trial counsel failed to rely on exceptions to rape shield law which would have allowed the defendant to present exculpatory evidence required evidentiary hearing.

FIFTH AMENDMENT

Fields v. Leapley, No. 93-3034, 7/26/94
The prosecutor's comments on the defendant's post-arrest, post-warning silence in violation of Doyle v. Ohio required habeas relief. Because no Chapman harmless error analysis was

conducted by the state court, this standard, rather than Brecht, must be used to determine harm. Harm was shown here: there were two references, the defendant's objection was overruled so there was no curative instruction, and the evidence of guilty was not overwhelming on the self-defense issue.

FIRST AMENDMENT

McDermott, No. 93-2952, 7/11/94
A conviction for violating a protected federal right by cross burning in a public park was vacated. The jury was not instructed in such a way as to eliminate the possibility that protected First Amendment activity was basis of conviction.

FORFEITURES

Alexander, No. 90-5417, 7/12/94
This forfeiture case was remanded to the district court for excessive fines analysis. The court is to consider, among other factors, the value of the property, the extent of criminal activity, the gravity of the offense, and any other factors it deems relevant.

One Parcel of Real Property, No. 93-3350, 6/15/94
The granting of the government's unopposed motion for summary judgment was improper where the real property was seized without notice and hearing in violation of US v. James Daniel Good Real Property. Good applies retroactively to cases pending when it was decided. In dictum the appellate court criticizes the district court for applying a test for excessive fine involving only the relationship between the forfeited property and the offense, without considering the value of the property, the extent of the criminal activity, the property's residential character, the possibility of harm to innocent occupants, etc.

Bieri, No. 93-2157, 4/13/94
The forfeiture judgment is reversed and remanded for an excessive fines clause analysis. The trial court originally forfeited only part of the property. The court of appeals says the entire property is subject to forfeiture unless the forfeiture runs afoul of the excessive fines clause.

GENERAL SENTENCING ISSUES

Bewley, No. 94-1045, 6/20/94
On revocation of supervised release it was improper to sentence the defendant to a term of imprisonment followed by supervised release the total of which exceeded his original supervised release term. However, he is not entitled to any credit for the time spent on supervised release prior to revocation.

HABEAS CORPUS

Fields v. Leapley, No. 93-3034, 7/26/94
The prosecutor's comments on the defendant's post-arrest, post-warning silence in violation of Doyle v. Ohio required habeas relief. Because no Chapman harmless error analysis was conducted by the state court, this standard, rather than Brecht, must be used to determine harm. Harm was shown here: there were two references, the defendant's objection was overruled so there was no curative instruction, and the evidence of guilty was not overwhelming on the self-defense issue.

Elem v. Purkett, No. 93-1793, 6/1/94
Habeas relief was granted on a Batson issue. The prosecutor's disapproval of a prospective juror's haircut and beard is not a legitimate race-neutral ground for a strike.

Branch v. Turner, No. 92-3935, 6/28/94
The dismissal of the defendant's state appeal was improper, and habeas relief was granted. The court used the fugitive dismissal principle, but the defendant was a fugitive for only three days between trial and sentencing, and filed her notice of appeal within the time which would have been allowed had she been sentenced on her original date. The court of appeals dismissed after full briefing and oral argument on the merits. When the state grants a right of appeal, the procedures must comply with the Due Process Clause, which forbids arbitrary state action. "If a defendant's pre-appeal flight does not adversely affect the appellate process... there is no rational justification for a state appellate court to strip the defendant of the right to appeal under the fugitive dismissal rule."

Shaw, No. 93-2052, 5/16/94
A claim in a habeas petition that trial counsel failed to rely on exceptions to rape shield law which would have allowed the defendant to present exculpatory evidence required evidentiary hearing.

JURISDICTION

Copley, No. 93-1739, 5/31/94
Where the defendant was committed after an insanity verdict in North Carolina, was conditionally released, and violated his conditions of conditional release in California, the Western District of Missouri lacked jurisdiction to revoke the conditional release. The fact that the defendant was confined at Springfield did not solve the jurisdictional problem where neither the original case nor the violation occurred in the Western District.

JURY SELECTION AND COMPOSITION

Davidson v. Harris, No. 93-3055, 7/21/94
The judgment in this §1983 case in favor of the defendants was reversed where the defendants excluded blacks from the jury by using peremptory strikes. The explanations for the strikes were not accepted because similarly situated white jurors were not struck.

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MENTALLY ILL OFFENDERS

Copley, No. 93-1739, 5/31/94
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Bilyk, No. 93-4133, 7/13/94
The court received a report which said an insanity verdict defendant was no longer mentally ill but had a personality disorder and was dangerous. The court declined to release the defendant, relying on earlier reports. Reversed and remanded. The presumption of continuing mental illness that exists when an insanity acquittal is ended doesn't last forever.

PROBATION REVOCATION

Zentgraf, No. 93-2786, 4/5/94
The confession of the defendant's co-defendant was used against the defendant at his revocation hearing in violation of Fed. R. Crim. Pro. 32.1(a) and the Sixth Amendment. There was no showing that the co-defendant was unavailable as a witness.

SEARCH AND SEIZURE

Hogan, No. 93-3794, 6/3/94
Agents had a warrant to search the defendant's truck, which was described as the vehicle he used to transport drugs, and his house. The defendant was found in another vehicle, which the agents seized, then got a warrant to search. The seizure was not authorized because there was no probable cause to stop the car, detain the defendant five miles from home, take him home in handcuffs, and then seize the car. Leon did not apply because the agents could not reasonably have relied on the warrant to justify their actions. The motion to suppress should have been granted, and the defendant's conditional plea of guilty is vacated.

Garcia, No. 93-2195, 5/4/94
The defendant's motion to suppress should have been granted. The police stopped the defendant once for weaving, gave him a warning and discovered nothing suspicious. They let the defendant go. Then they discovered that one of the occupants of the vehicle had a prior arrest, stopped the vehicle again, and searched it, finding drugs. In overturning the stop, the court commented, "Although we are mindful that 'conduct which would be wholly innocent to the untrained observer... might acquire significance when viewed by an agent who is familiar with the practices of drug smugglers and the methods used to avoid detection...' we find it difficult to perceive the connection between driving a rented truck full of furniture in Nebraska and drug trafficking." The Mexican nationality of the occupants, the fact that their destination was a "source city" (El Paso), and the prior arrest of the defendant did not justify the second stop.

Bloomfield, No. 93-2970, 5/19/94
The defendant's motion to suppress should have been granted where the defendant's nervousness, red eyes (it was late at night), partial opening of the door when asked to leave his truck (lots of traffic), smell of deodorizer in car, and pager were insufficient to justify the one-hour detention of the defendant and truck to get a drug dog.

Robbins, No. 93-2027, 4/12/94
The trial court's granting of a new trial was affirmed where the trial court properly held that evidence seized from the defendant's wallet should have been suppressed. The seizure was without warrant and was not contemporaneous with the defendant's arrest. Although there was a warrant which covered the search of the wallet, the warrant did not authorize the seizure and the documents in evidence were not discovered until the middle of the defendant's trial. Given the state of the evidence, harm was shown.

SENTENCING GUIDELINES

Garfinkel, No. 93-3873, 7/13/94
The sentence and conviction were affirmed. In so doing, the court rejected the government's contention that a sentencing enhancement based on special skill should have applied. The defendant was a psychiatrist who falsified research

data, but he used his managerial skills, not his psychiatric skills, to do this. The trial court's fact finding was not clearly erroneous and was therefore upheld.

Mendoza-Figueroa, No. 93-2876, 6/27/94
In amending Sentencing Guidelines sec. 4B1.1 to allow a defendant to be classified as a career offender based on a prior conspiracy conviction, the Sentencing Commission exceeded its statutory authority under 28 U.S.C. §994(h). The career offender classification was therefore improper in this case.

Brewer, No. 93-3003, 5/4/94
The trial court erred in imposing a sentence to be served consecutive to a state sentence the defendant had already started serving. Under Sentencing Guidelines sec. 5G1.3, the proper procedure was to determine what the federal sentence would have been if the state case were a federal charge along with the offense for which the defendant was being sentenced in federal court. Then, the court should have subtracted the amount of time the defendant had served on the state sentence, and imposed the remainder as the concurrent federal sentence. The commentary to 5G1.3, which requires this result, is binding.

Robinson, No. 93-3326, 4/25/94
The sentence was reversed because the court erroneously used the drug quantity of two kilograms of cocaine which was discussed to set the offense level. The defendants didn't have enough money to buy this amount; simply expressing a desire is not enough to show an intended amount. The factual finding was clearly erroneous and the offense level was reduced by two levels.

Fetlow, No. 93-2377, 4/7/94
The case was remanded to the trial court for articulation of the basis of the trial court's finding concerning drug quantity

Kiefer, No. 93-2247, 4/1/94
When a federal sentence should be concurrent with a state sentence which the defendant has already begun serving, it is proper, under Sentencing Guidelines sec. 5G1.3(b), to sentence below the mandatory minimum if the total time served will satisfy the mandatory minimum.

SPEEDY TRIAL

Miller, No. 93-2451, 4/7/94
Where the government made no explanation for its failure to indict the defendant within thirty days of arrest, it was an abuse of discretion to dismiss the indictment without prejudice. The government has the burden to explain the delay. Because of the lack of explanation, dismissal with prejudice is required.

SUFFICIENCY OF EVIDENCE

Dunlap, No. 93-3540, 7/5/94
There was insufficient evidence to support the defendant's convictions for possession with intent to distribute and possession of a gun during that crime. The evidence showed only the defendant's presence at the co-defendant's apartment where the drugs were found; the evidence was equally consistent with his presence as a customer, which was not charged.

Swink, No. 93-1763, 4/15/94
There was insufficient evidence to support the perjury conviction; perjury in making very specific statements was alleged and their falsity was not proved beyond a reasonable doubt.

Recent Missouri Cases

by Kris Daniel, Missouri Capital Punishment Resource Center

DOUBLE JEOPARDY

State v. Cobb, 1994 WL 145434, No. 75685 slip op. (Mo. April 26, 1994) -

Remand to allow the state to prove a third prior conviction, after the trial court had erroneously found the defendant to be a persistent DWI offender, does not offend double jeopardy. Applying the rationale of Bullington v. Missouri, 451 U.S. 430 (1981), the Missouri Supreme Court held that double jeopardy does not attach to Missouri's noncapital persistent offender sentencing, leaving the state free to present whatever evidence it may have at a resentencing hearing to establish the defendant is, as he was charged and sentenced the first time, a persistent offender.

JURY INSTRUCTIONS - LESSER INCLUDED OFFENSES

State v. Israel, 872 S.W. 2d 647 (Mo. App. E.D. 1994) -

The defendant's convictions for second degree murder and armed criminal action are reversed and remanded for a new trial where the trial court refused to give the requested lesser included manslaughter offense instruction and facts were sufficient to support the instruction.

RETROACTIVITY

State v. Ware, 872 S.W. 2d 601 (Mo. App. E.D. 1994) -
The Missouri Supreme Court's decision in State v. Erwin, 848 S.W. 2d 476 (Mo. 1993) (instruction on intoxication or addiction violates due process by potentially relieving the state of the requirement of proving every element of a crime) does not apply retroactively if the defendant does not preserve the issue by objecting to the instruction for new trial.

INMATE RECORDS

Callahon v. Kinder, 1994 WL 199820, No. 48991 slip op. (Mo. App. W.D. May 24, 1994) -

A local rule denying courthouse access to inmates unless the Department of Corrections has made an *in camera* disclosure of medical information, particularly of the inmate's HIV status, violates the inmates' constitutional right to privacy in such records.

PEREMPTORY CHALLENGES

State v. Hayden, 1994 WL 283147, No. 60995 slip op. (Mo. App. E.D. June 28, 1994) -

> Government remains the paramount field of unwisdom because it is there that men seek power over others - and lose it over themselves. *Barbara Tuchman, 1980.*

The case is remanded to determine if the prosecutor's use of peremptory strikes to remove three female venirepersons was motivated by a gender bias.

POST-CONVICTION - COGNIZABLE CLAIMS

Murphy v. State, 873 S.W. 2d 231 (Mo. banc 1994) -

The Missouri Supreme Court held that post-conviction motions can no longer include claims of credit for time served.

PROCEDURAL DEFAULT

State v. Fanning, 874 S.W. 2d 401 (Mo. App. W.D. 1994) -

The defendant's objection at trial, that his due process rights were denied by the court's admission of intoxication instruction which unfairly relieved the state from proving the requisite mental state, was sufficient to preserve constitutional objection.

RULE 29.15

State v. Wise, 1994 WL 271625, No. 73648 slip op. (Mo. June 21, 1994) -

Rule 29.15(h), which allows courts to continue a hearing for good cause, should be read to supplement Rule 29.15(g), which requires a hearing to be held within sixty days of the date of the order granting the hearing, allowing courts to grant continuances beyond sixty days after the granting of a hearing.

RULE 29.15 - TIMELY FILING

State v. Isaiah, 874 S.W. 2d 429 (Mo. App. W.D. 1994) -
The case is remanded to the motion court for a factual determination as to the reason for the untimeliness of movant's first amended motion for post-conviction relief, but movant's second amended petition fails as both untimely and unverified.

SEARCH AND SEIZURE

State v. Wise, 1994 WL 271625, No. 73648 slip op. (Mo. June 21, 1994) -

In affirming appellant's death sentence, the Missouri Supreme Court extended Washington v. Chrisman, 455 U.S. 1 (1982), which allows police to accompany an arrestee when he retrieves items in areas that would otherwise be protected from a warrantless search, to allow police to accompany a *third party* sent to retrieve items for an arrestee. Thus, police did not need a search warrant when they followed appellant's step-son into the apartment as he retrieved appellant's personal items and then seized evidence under the plain-view doctrine.

COUNSEL -- EFFECTIVENESS -- GUILTY PLEA

Hampton v. State, 877 S.W. 2d 250 (Mo. App. W.D. 1994) -

The defendant is entitled to an evidentiary hearing to attempt to prove the claim that his guilty plea was not voluntary because he was misled by counsel.

COUNSEL -- EFFECTIVENESS -- TRIAL

Clay v. State, 876 S.W. 2d 760 (Mo. App. E.D. 1994) -

Post-conviction movant is entitled to an evidentiary hearing on his ineffective assistance of counsel claim that trial counsel failed to investigate an available alibi defense.

State v. Akers, 877 S.W. 2d 147 (Mo. App. S.D. 1994) -

The court relied on Ortega-Rodriguez v. United States, 113 S. Ct. 1199 (1993), which held that the escape rule should not be applied when the escape occurred before sentencing and had no impact on the appellate process, to hold that the defendant's escape did not result in waiver of his right to appeal.

JURY SELECTION -- DISCRIMINATION

State v. Holloway, 877 S.W. 2d 692 (Mo. App. E.D. 1994) -

Batson applies to the racially motivated removal of any venireperson regardless of his or her race.

State v. Seddens, 878 S.W. 2d 89 (Mo. App. E.D. 1994) -

The case is remanded for a Batson hearing after the trial court failed to require the state to provide race-neutral reasons for its use of peremptory strikes against two black venirepersons.

PROSECUTORIAL MISCONDUCT -- RIGHT TO REMAIN SILENT

State v. Flynn, 875 S.W. 2d 931 (Mo. App. S.D. 1994) -

The state improperly introduced and referred to evidence that the defendant failed to volunteer an exculpatory statement following his arrest, in violation of the defendant's right to remain silent. The court examined the unpreserved issue under plain error review and remanded the case for a new trial.

MACDL Members Invited to Attend Public Defender Trial Skills Workshop

For the first time ever, the Trial Skills Workshop, produced and directed by the Missouri Public Defender System, is open to private practitioner-MACDL members. Through ongoing cooperation between the State Public Defender System and MACDL, a limited number of MACDL members may attend this workshop without charge (meals and lodging not included). The program is designed as an intensive, six-day course; if you're interested in attending for a shorter time, contact Cathy Kelly to see if that might be feasible.

WHEN: Monday, November 14, through Saturday, November 19.

WHERE: Best Western, Columbia, MO.

WHAT: The workshop covers all aspects of basic trial preparation through lectures, demonstrations and small classes (one coach per eight students).

TAUGHT BY: Missouri Public Defenders, P.D. Training Experts from other states, and some members of the private bar, including MACDL board members Charlie Atwell and J.R. Hobbs.

PARTICIPANTS: Public defenders and a limited number of MACDL members.

CONTACT: Cathy Kelly of the St. Charles Public Defender Office (314/949-7300).

BOOK REVIEW: <u>THE CHAMBER</u>

by Jim Worthington

John Grisham's latest best-seller is somewhat less thrilling than his prior works because he focuses on the emotional, polarizing, visceral subject of the death penalty. While Mr. Grisham again utilizes his successful formula - intensive research and investigation filtered through a keen southern eye - <u>The Chamber</u> keeps you reading more for character than for plot. The book's flyleaf notes that 400 racially motivated bombings occurred in Mississippi between 1964 and 1968.

Grisham, a Mississippian, tells the story of Sam Cayhill, a Klan member who helps plant a bomb in a Jewish lawyer's office. Sam didn't intend to blow up any children; he also didn't plan on getting caught. Two trials end with hung juries, basically Mississippi in the 60s. A third jury, in 1979, reaches a verdict - the ultimate one.

A brand-new lawyer, Adam Hall, risks everything to represent Sam on his last-ditch habeas appeals. Why? Read the book.

Grisham's death-row defendant is no saint, no martyr, but he's human. Grisham doesn't preach or moralize, nor does he attempt to provide THE ANSWER. Much as <u>To Kill a Mockingbird</u> and <u>Anatomy of a Murder</u> did, this book tells an important story and leaves it to us, the readers, to formulate the questions and, perhaps, the answers.

A final admonition: Don't go to a social gathering and get trapped in a discussion of the death penalty without having read this book.

[Ed. note: This Grisham fan was a bit disappointed in <u>The Chamber</u> as a work of fiction, partly because several red herrings were not developed into the subplots they seemed to warrant. I do doff my hat to Mr. G., though, for a sensitive and realistic portrayal of life on death row. Grisham has a huge audience, many of whom are thinking about capital punishment for the first time as a result of this book. It's definitely worth reading, and perhaps giving as a gift to that brother-in-law with whom you're always arguing about the Eighth Amendment.]

Report on the 1994 Federal Crime Bill

<u>Death Penalty</u>

The bill increases the number of federal offenses punishable by death from two to about sixty. Included are such crimes as fatal carjackings and drive-by shootings, treason, kidnapping resulting in death, and murder of a federal law enforcement official. The bill also establishes the procedures by which the death penalty can be imposed.

<u>Racial Justice Act</u>

The crime bill *does not* include the Racial Justice Act, a provision that would allow defendants to use sentencing statistics to challenge a death penalty as racially discriminatory.

Safety Valve

The bill allows federal judges to depart from mandatory minimum sentences and sentence first-time nonviolent drug defendants in accordance with the sentencing guidelines, if the defendant meets certain criteria: (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense; (5) no later than the time of the sentencing hearing, the defendant has provided to the government all information in his possession concerning the offense (or offenses) that was part of the same course of conduct or of a common scheme or plan. The fact that the defendant has no relevant or useful information to provide shall not preclude or require a determination by the court that the defendant has complied with this requirement. This provision is not retroactive.

Three Strikes

The bill mandates life in prison for three-time felons with a third conviction for a violent felony. The two previous convictions can be for either a violent felony or a serious drug offense (defined [in Title 21 of the U.S. Code] by the quantity of drugs involved). There is a "geriatric exemption" allowing possible release of inmates over 70 who have served 30 years and who are deemed no longer dangerous.

Mandatory Minimums

The bill includes no new mandatories, but does nothing to eliminate those already on the books.

Prevention Programs

The prevention package is funded at approximately $5.5 billion, including grants for recreation, employment, anti-gang and comprehensive programs to steer youth away from crime, and drug treatment for federal and state inmates. The package includes $1.6 billion for the Violence Against Women Act, including a number of new federal penalties and grant programs designed to reduce domestic violence and other crimes against women. Crimes motivated by gender become federal civil rights violations. $1 billion of the package is for drug courts which seek to rehabilitate first-time or nonviolent drug offenders with intensive treatment and supervision rather than incarceration.

Juvenile Justice

Juveniles 13 and older can be tried in adult courts for certain violent crimes, but the process is optional rather than mandatory. The bill also bars the sale of handguns to juveniles.

Police Hiring and Prison Spending

The bill allocates about $8.8 billion over six years to hire 100,000 new police officers. $9.9 billion in state construction grants is authorized for prisons and boot camps, though that sum is divided as follows: 50% (a mere $4.95 billion) will be distributed to states that demonstrate *general* progress toward ensuring that violent criminals serve long sentences; the other 50% (or $4.95 billion, but who's counting?) is reserved for states with

specific, tough sentencing policies, such as ensuring that violent offenders serve at least 85% of their sentences. An additional $1.8 billion is authorized for reimbursing states for the cost of incarcerating illegal aliens who commit crimes.

The bill includes a provision deleting all funds for Pell Grants for inmates. It also provides that prisoners must make an affirmative showing of good behavior to receive "good time" credits, ostensibly ending the automatic crediting of good time.

Assault Weapons Ban

The bill bans for ten years the manufacture and possession of nineteen "assault weapons" as well as copycat models and semi-automatic guns with two or more characteristics associated with assault weapons. The measure also bars ammunition-feeding devices ("clips") that hold more than ten rounds. However, the bill specifically exempts more than 650 semi-automatic weapons, and allows gun owners to keep any guns they now own legally. Pawnbrokers are exempted from the Brady Bill, which requires gun purchasers to submit to a background check. In addition, pawnbrokers may sell weapons without conducting such a check on prospective buyers.

Another gun measure prohibits even peaceful anti-hunting protests on federal lands.

Sex Offenders

The bill allows notification of residents when violent sexual offenders are released into a community. Such offenders must register quarterly with authorities for the remainder of their lives.

Courts, Prosecution and Indigent Defense

The bill allocates $150 million over six years, to be split between state prosecution and indigent defense.

Crime Trust Fund

The bill establishes a $30.2 billion trust fund to pay for the programs authorized.

Welcome, New Members & Membership Renewals

Michael L. Barrera, Westwood, KS
Marsha Brady, Hillsboro
Elizabeth Carlyle, Lee's Summit
Jacqueline Cook, Kansas City
Donald Cooley, Springfield
Thomas S. Davis, Jefferson City
Steve Dioneda, St. Louis
Diane M. Ellis, Kansas City
Michael Gorla, St. Louis
(Sustaining Member)
M. Christine Holiman-Hutson, Lebanon
W. Geary Jaco, Kansas City
Paul R. Katz, Kansas City
Kevin Locke, Kansas City
William S. Margulis, St. Louis
Joseph Passanise, Topeka, KS
Ronald Pedigo, Farmington
J. Reuben Rigel, St. Louis
Kevin Roberts, Hillsboro
J. Marty Robinson, Columbia
Larry A. Schaffer, Independence
(Sustaining Member)
Bruce Simon, Kansas City
(Sustaining Member)
Jim Speck, Kansas City
Rick M. Steinmann, St. Charles
Peter Sterling, Columbia
Christine Sullivan, St. Louis
Janet Thompson, Columbia
Phillip Thompson, Kansas City
James Worthington, Lexington
(Sustaining Member)

F.Y.I.

by Francie Hall

Fall Seminars

As noted in Dan Viets' PRESIDENT'S LETTER, dates of **MACDL**'s annual series of fall criminal defense seminars are:

OCTOBER 14 - ST. LOUIS;
OCTOBER 21 - SPRINGFIELD;
OCTOBER 28 - KANSAS CITY;
NOVEMBER 4 - COLUMBIA.

You should have received brochures with complete details on the seminars by the time this issue of the **ACTION REPORT** reaches you.

MACDL Board

The next meeting of **MACDL**'s Board of Directors is scheduled for 4:00 p.m. on Friday, November 11, at Pat Eng's office in Columbia (306 East Ash). Any board member who cannot attend is asked to advise Dan Viets' office (314/443-6866).

Annual Spring Seminar

Cecil Calkins, CLE Director of the Missouri Bar, just confirmed the date and location of **MACDL**'s 1995 Annual Spring Seminar: **April 28-29, 1995, at the Marriott Pavilion in downtown St. Louis.** Mark your calendars now, and plan to attend another great CLE event co-sponsored by **MACDL**, the Missouri Bar and the National Association of Criminal Defense Lawyers.

Wheat for Senate

Many **MACDL** members participated in a fund-raising event for Alan Wheat, Democratic nominee for the U.S. Senate, on Friday, September 23, in Kansas City. Those of you who couldn't attend but would like to contribute may send your check, payable to "Friends of Alan Wheat", to **Wheat for Senate**, 8612 E. 63rd Street, Kansas City, MO 64133 or 6528 Manchester, St. Louis, MO 63139. *(Please note: Rep. Wheat's candidacy is supported by individual members of MACDL; the Missouri Association of Criminal Defense Lawyers takes no position on races for federal office.)*

New Director of Missouri Public Defender System Confirmed

J. Marty Robinson, Acting Director since last spring, has been confirmed as Director by the Missouri Public Defender Commission. Congratulations, Marty!

Defender of Distinction Award

MACDL congratulates Cathy R. Kelly of St. Louis, recipient of the 1994 Defender of Distinction Award from the Missouri Public Defender Commission. Ms. Kelly, a public defender for ten years, has served as a trial attorney, an appellate attorney, a regional defender and now as a senior public defender. She is also an adjunct professor at Washington University and St. Louis University, and was a faculty member at the 1994 NLADA Trial Practice Institute. The award was presented September 21 at the annual meeting of the Missouri Bar.

MACDL Directory

Our first membership directory will be published this fall. Don't miss being included; use the form on page 19 to renew your membership today.

Advertisement

MACDL member needs examples of effective use of demonstrative evidence in the defense of criminal charges. War stories welcome. Send to: James D. Worthington, 9 South Eleventh Street, P. O. Box 280, Lexington, MO 64067 (816/259-2277).

MACDL Membership Application

If you are not currently a member of MACDL, **or if a red "X" appears on your mailing label indicating it's time to pay your annual dues,** please take a moment to complete a photocopy of this form and mail it today, with your check, to: Francie Hall, Executive Secretary, **MACDL,** P. O. Box 15304, K.C., MO 64106.

Annual Dues: (Circle applicable amount)

Sustaining Member - Officers, Board Members & Past Presidents:	$200.00
Regular Member - Licensed 5 years or more:	100.00
Licensed less than 5 years:	50.00
Public Defender (Head of Office):	50.00
Assistant Public Defender:	25.00
Provisional (Nonvoting) Member - Judges, Law Professors & Students, Paralegals & Legal Assistants:	20.00

Name ______________________________

Address ______________________________

City ______________ **State** ________ **Zip** __________

Phone __________ **Fax** __________ **Adm/Bar** __________

____ **Check here and add $10.00 to the amount of your dues check to contribute to MACDL's PAC Fund.** ***(Note: A PAC contribution is not a requirement of membership in the Missouri Association of Criminal Defense Lawyers.)***

MACDL
P. O. Box 15304
K.C., MO 64106

A red "X" on your address label indicates that you owe annual dues.
Please use form on page 19.

Address Change/Correction

Please verify the information on your mailing label above; in order to keep your nemwsletter intact, return a photocopy of this entire page with any corrections.

Name ______________________ County ______________________________

Street ____

City ______________________ State ____________ Zip ________________

Phone _________________________ Fax ______________________________